Petition

81-2048

NO. 81-_____

Office - Supreme Court, U.S.
FILED
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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1981

W.J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

MARK MILTON MOORE,
Respondent

**Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit**

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QUESTIONS PRESENTED

I. Does *Davis v. Georgia* foreclose the possibility that *Witherspoon v. Illinois* error can be harmless beyond a reasonable doubt?

II. Is the exclusion of a venireman in violation of the doctrine of *Witherspoon v. Illinois* harmless beyond a reasonable doubt where the state demonstrates that it would have peremptorily excused the venireman had he not been excused for cause?

TABLE OF CONTENTS

Cases	Page
QUESTIONS PRESENTED	i
INDEX OF AUTORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	3
ARGUMENT	
I. There are special and important reasons for granting the writ	4
II. *Davis v. Georgia* does not foreclose the possibility that *Witherspoon v. Illinois* error can be harmless beyond a reasonable doubt	4
III. The exclusion of a venireman in violation of the doctrine of *Witherspoon v. Illinois* is harmless beyond a reasonable doubt where the state demonstrates that it would have peremptorily excused the venireman had he not been excused for cause	5

INDEX OF AUTHORITIES

Cases	Page
Alderman v. Austin, 663 F.2d 558 (5th Cir. 1981)	5
Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979) *adhered to en banc*, 626 F.2d 396 (5th Cir. 1980)	5
Chapman v. California, 386 U.S. 18 (1967)	6
Davis v. Georgia, 429 U.S. 122 (1976)	4,5
Grijalva v. State, 614 S.W. 2d 420 (Tex. Crim. App. 1981)	6
Moore v. Estelle, 670 F.2d 56 (5th Cir. 1982)	2
Moore v. State, 542 S.W.2d 774 (Tex. Crim. App. 1976)	3
Moore v. Texas, 431 U.S. 949 (1977)	3
Schneble v. Florida, 405 U.S. 426 (1972)	6
Witherspoon v. Illinois, 391 U.S. 510 (1968)	4
OTHER AUTHORITIES	
U.S. Const. art. VI	2
U.S. Const. art. XIV	2
28 U.S.C. §1254	2
28 U.S.C. §2241	7

28 U.S.C. §2254 3

Article 37.071 V.A.C.C.P. 3

NO. 81-_____

IN THE
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W.J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
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V.

MARK MILTON MOORE,
Respondent

Petition For Writ Of Certiorari To
The Unitcd States Court Of Appeals
For The Fifth Circuit

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES W.J. Estelle, Jr., Director, Texas Department of Corrections, Petitioner herein, by and through his attorney, the Attorney General of Texas, and requests that the Court grant this his petition for writ of certiorari, and as grounds therefor, would respectfully show the Court the following:

OPINIONS BELOW

The United States District Court for the Northern

District of Texas, Dallas Division, on February 24, 1981, entered a judgment and memorandum order adopting the recommendation of the United States Magistrate and granting Respondent Mark Milton Moore's application for writ of habeas corpus under 28 U.S.C. §2254 and vacating his death sentence. (Appendix B). On March 12, 1982, a panel of the United States Court of Appeals for the Fifth Circuit affirmed the district court's judgment in an opinion (Appendix A) published as *Moore v. Estelle*, 670 F.2d 56 (5th Cir. 1982).

JURISDICTION

The Court has jurisdiction to review the judgment of the Court of Appeals entered March 12, 1982, under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, art. VI, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...

United States Constitution, art. XIV, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner has custody of Respondent pursuant to a judgment and sentence of the Criminal District Court of Dallas County, Texas. Respondent was indicted on April 8, 1974, in Cause No. C-74-3180PH, for the offense of capital murder. After lengthy jury selection, trial on the merits began on May 13, 1974. On May 14, 1974, the jury found Respondent guilty of murdering Martha Janette Williams while in the course of robbing her. A sentence of death was imposed after the jury answered affirmatively the special issues submitted pursuant to Article 37.071, V.A.C.C.P.

Respondent's conviction was affirmed by the Texas Court of Criminal Appeals on October 6, 1976, in *Moore v. State*, 542 S.W.2d 774 (Tex.Crim.App. 1976). Certiorari was denied by this Court on May 31, 1977 in *Moore v. Texas*, 431 U.S. 949 (1977).

Thereafter, Respondent filed his petition for federal habeas corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Northern District of Texas, Dallas Division. The recommendation of the United States Magistrate was filed on February 24, 1981. The findings and conclusion of the Magistrate were adopted by the district court in a memorandum opinion entered on April 27, 1981, which vacated the 1974 death sentence imposed in this case. Thereafter, Petitioner filed notice of appeal to the United States Court of Appeals.

On March 12, 1982, the Fifth Circuit Court of Appeals affirmed the judgment of the district court. This petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I.

THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT.

The Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. The court's holding that a violation of the doctrine of *Witherspoon v. Illinois*, 391 U.S. 510 (1968), during jury selection *per se* requires a vacation of the death sentence without regard to the circumstances, represents an unwarranted extension of this Court's opinion in *Davis v. Georgia*, 429 U.S. 122 (1976). The voir dire examination and selection of a jury constitutes the lengthiest and perhaps most difficult aspect of the trial of any capital case. The question whether such error can be harmless under any circumstance is of great import to the various states which attempt to carry out their lawful death penalty statutes.

II.

DAVIS V. GEORGIA, DOES NOT FORECLOSE THE POSSIVILITY THAT *WITHERSPOON V. ILLINOIS* ERROR CAN BE HARMLESS BEYOND A REASONABLE DOUBT.

The court below held that:

> ... the Supreme Court has clearly held, in a case where the state arguably retained a peremptory challenge, that the exclusion of even *one* venireman on grounds broader than those of *Witherspoon* precludes the imposition of the death penalty. *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976). And though the Court's reasoning escapes us, its holding, referred to by Justice Rehnquist in dissent as a per se rule, is clear and must be followed.

670 F.2d at 57 (footnote omitted).

In *Davis*, this Court rejected the argument that the exclusion of one juror in violation of *Witherspoon* does not necessitate the vacation of the death sentence, since it does not amount to "systematic exclusion" of death-qualified jurors. The dissenting opinion of Justice Rehnquist in *Davis* first raised the question "whether the presence of unexercised peremptory challenges might render harmless the improper exclusion of a limited number of veniremen." 429 U.S. at 124. Whether there were remaining unexercised peremptory challenges, however, was unclear on the record before the Court. Also, in *Davis*, there was no indication whether the prosecutor *would* have used a peremptory challenge to exclude the juror, had the challenge for cause been denied.

In the instant case, the record affirmatively reflects both that the state retained unused peremptory challenges at the conclusion of the voir dire and that it would have utilized these to exclude the veniremen in question, had the state's challenges for cause not been sustained. *Cf. Alderman v. Austin*, 663 F.2d 558 (5th Cir. 1981)(rehearing *en banc* granted); *Burns v. Estelle*, 592 F.2d 1297 (5th Cir. 1979) *adhered to en banc*, 626 F.2d 396 (5th Cir. 1980). Because this case contains a record which is markedly different from that in *Davis*, the court below erred in holding that *Davis* establishes a *per se* rule applicable in all capital cases without regard to individual circumstances presented. The holding of the court below represents an overly broad interpretation of the language in *Davis*, which should not foreclose consideration of the state's "harmless error" argument.

III.

THE EXCLUSION OF A VENIREMAN IN VIOLATION OF THE DOCTRINE OF *WITHERSPOON V. ILLINOIS* IS HARMLESS BEYOND A REASONABLE DOUBT WHERE THE STATE

DEMONSTRATES THAT IT WOULD HAVE PEREMPTORILY EXCUSED THE VENIREMAN HAD HE NOT BEEN EXCUSED FOR CAUSE.

In the district court, the state offered evidence which showed that, had the challenges for cause to two veniremen been overruled, then the prosecutor, as a matter of trial tactics, would have exercised peremptory challenges to each. This assertion as to the prosecutor's trial tactics is borne out by his conduct as reflected in the record. The court below refused to find that the erroneous exclusion of venireman Katherine C. Kearby was rendered harmless, even though the state offered substantial proof that, had the erroneous challenges for cause not been sustained, the venireman would have been excluded anyway from the panel, by the prosecution's use of a peremptory challenge.

Once a constitutional violation has been found, the state's burden to show harmless error is clear; it must prove beyond a reasonable doubt that the error was rendered harmless by some other factor. *E.g. Schneble v. Florida*, 405 U.S. 426 (1972); *Chapman v. California*, 386 U.S. 18 (1967). This, Petitioner has done, by proof that venireman Kearby would have been excluded from the panel in any event.

The court below based its rejection of Petitioner's "harmless error" argument on the fact that a similar argument had been rejected by the Court of Criminal Appeals of Texas in *Grijalva v. State*, 614 S.W.2d 420 (Tex.Crim.App. 1981)(on rehearing). The decision of the state court, however, was premised upon state procedural law, and not on matters of fundamental fairness or federal or state constitutional law. Also, the state appellate court was not confronted with a record such as presented here, which contains proof beyond merely that the state retained unexhausted peremptory challenges at the conclusion of the voir dire. Still fur-

ther, it is axiomatic that in federal habeas corpus to review state convictions, only questions of federal constitutional law are cognizable. 28 U.S.C. §2241. Thus, that state procedural law is unclear as to whether the retroactive exercise of peremptory challenges would be permissible on the instant record is not dispositive of Petitioner's contention that he has proven federal constitutional error harmless. For these reason, the state has met its burden of proving constitutional error harmless beyond a reasonable doubt.

CONCLUSION

For these reasons, Petitioner respectfully prays that the petition for writ of certiorari be granted and the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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Appendix

APPENDIX A

Mark Milton MOORE,
Petitioner-Appellee,

V.

W.J. ESTELLE, Jr.,
Respondent-Appellant.

No. 81-1241.

United States Court of Appeals,
Fifth Circuit.

March 12, 1982.

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, GOLDBERG and GEE, Circuit Judges.

GEE, Circuit Judge:

Again, as we did in *Burns v. Estelle*,[1] we confront a hideous and unprovoked murder; again, as in *Burns*, *Witherspoon v. Illinois*[2] and its progeny are in play; and again, as in *Burns*, we are forced to hold invalid a capital sentence which, given the limits of our merely human understanding, this brutal shotgun slaying of a helpless victim seems clearly to merit.

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1. 592 F.2d 1297 (5th Cir. 1979), *adhered to en banc*, 626 F.2d 396 (5th Cir. 1980).

2. 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

In response to Moore's habeas petition, the trial court held that three jurors were erroneously excluded under the *Witherspoon* tests. We need go no further than to examine the testimony of Katherine C. Kearby, one of these three, to conclude that at least one was wrongly excluded. As the court below correctly found, Ms. Kearby did not wish to serve in such a case. She maintained, however, that while she was reluctant to be a part of the proceeding and her feelings would "affect" her deliberations, still she "would answer the questions truthfully but I don't know that I would ever feel good about it." Near the end of her lengthy questioning, she summed up her position as "[i]f you make me do it, I'll do it right." Her exclusion was improper. *Burns v. Estelle, supra.*

The state argues, however, that the exclusions, if improper, should be viewed as harmless error, since the state went to trial with unexercised peremtory challenges sufficient to have covered any improperly excused jurors. That these would have been used had the jurors in question not been excluded for cause was attested to the court below by affidavit of the attorney who had prosecuted Moore's case some seven years earlier.

Tempted as we are to embrace the state's contentions, we find ourselves unable to do so. In the first place, the Supreme Court has clearly held, in a case where the state arguably retained a peremptory challenge, that the exclusion of even *one* veniremen on grounds broader than those of *Witherspoon* precludes the imposition of the death penalty. *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976). And though the Court's reasoning escapes us,[3] its holding, referred to by Justice

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3. That supplied by Judge Goldberg's eloquent special concurrence goes far, however, to supply this.

Rehnquist in dissent as a per se rule, is clear and must be followed. In the second, and without in the least calling in question the sincerity of the former prosecutor's affidavit assertions, we cannot countenance what amounts to an attempt to exercise—retroactively and by affidavit in defense of a collateral attack—peremptory challenges reserved at the time. The Court of Criminal Appeals of Texas has expressly rejected the state's attempt to exercise leftover peremptions on direct appeal. *Grijalva v. State*, 614 S.W.2d 420, 424-5 (Tex.Crim.App.1980)(en banc). It would be anomalous for us to countenance it in this far more attenuated situation; indeed, considerations of fundamental fairness night be implicated. What would have happended is seldom a subject of satisfactory proof; and we conclude that if in a capital case Texas is in doubt as to whether the trial court has properly excused a juror for cause, the time to balance adding a peremptory challenge to that juror against the unkown exigencies that may arise from the serial file of veniremen yet to be questioned has likely arrived.

AFFIRMED.

GOLDBERG, Circuit Judge, specially concurring:

I concur fully in Judge Gee's impeccable and unexceptionable analysis of the *Witherspoon* problem and his disposition of this case. However, I would like to offer a few thoughts in support of his conclusion regarding the "harmless error" issue.

The State of Texas virtually concedes that at least one of the veniremen in this capital case was erroneously excluded from the jury panel in violation of the guidelines set forth in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). However, the State argues that since the prosecutor stood ready to use

available peremptory challenges to exclude this same juror, the error was harmless beyond a reasonable doubt.

I concur with Judge Gee's finding that the State's argument is foreclosed by the Supreme Court's opinion in *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976) and our court's decision in *Burns v. Estelle*, 592 F.2d 1297 (5th Cir. 1979) *adhered to en banc*, 626 F.2d 396 (5th Cir. 1980). I agree that "the exclusion of even *one* venireman on grounds broader than *Witherspoon* precludes the imposition of the death penalty." *ante*, Slip op. at 1402, at _____.

As I would expect, Judge Gee has dutifully adhered to the rule set forth in *Davis v. Georgia*, supra, and *Burns v. Estelle, supra*. However, I note that he has done so with an expression of regret. I, on the other hand, have no such reservations, for I believe that even if we were not bound by principles of *stare decisis*, there would be sound reasons for rejecting the State's "harmless error" argument.

Texas contends that the erroneous exclusion of a particular venireman "for cause" was harmless beyond a reasonable doubt because the State stood ready to use an available peremptory challenge. In essence, the State argues that even if the trial court had acted properly and refused to excuse the venireman for cause, the prosecutor would have used a peremptory challenge to keep that prospective juror off the panel. Thus, the State maintains that the trial court's error could not have had any substantive effect, since the venireman in question would have been excluded from the panel even if he had not been erroneously excused by the trial court.

In their "harmless error" argument, the State has assumed that the crucial question is whether *a particular veniremen* was excluded from the jury panel as

the result of the trial court's erroneous ruling. However, I believe that the State's syllogism is logically flawed. The proper focus of our inquiry is whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error. While it may be true that the exclusion of a particular venireman was not affected by the trial court's erroneous ruling, it does not necessarily follow that the composition of the entire jury panel was unaffected by the error.

In Texas capital cases, venireman are examined *seriatum* by the defense and prosecution. "[P]rospective jurors ... are examined individually and must be challenged and passed upon separately." *Pierson v. State*, 614 S.W.2d 102, 107 (1981). Thus, as a prospective juror comes before the court, the prosecutor must then and there decide whether she will accept the juror, challenge for cause, or exhaust one of her limited number of peremptories. Clearly, the prosecutor's strategic calculus is affected by the number of peremptory challenges left to her and by the number of jury panelists still awaiting selection. As the prosecutor depletes her limited number of peremptory challenges, she may be willing to accept certain jurors she might have otherwise rejected given a larger reserve of peremptories.

The import of this observation should be clear. Texas claims that it would have used three of its peremptory challenges to exclude the three jurors found to have been improperly excused for cause. However, even if we assume that the prosectuor in this case would have used those three additional peremptory challenges,[1] how can

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1. I agree with Judge Gee that "...without in the least calling into question the sincerity of the former prosecutor's affidavit assertions, we cannot countenance what amounts to an attempt to exercise –retroactivity and by affidavit—peremptory challenges reserved at the time." *ante*, slip op. at 1402, at _____.

we know beyond a reasonable doubt that the selection of the remainder of the jury panel would have been unaffected? If the trial court had ruled properly and the prosecution had been forced to use these three additional peremptory challenges, it is entirely possible that the State would have chosen to acquiesce in the impaneling of other prospective jurors it actually challenged given the luxury of a pocketful of "peremptories."[2]

Thus, when a trial court erroneously excludes venireman "for cause," it allows the prosecutor to save peremptory challenges it would otherwise have had to use to exclude those prospective jurors. Armed with more peremptory challenges than she would have had if the trial court had ruled correctly, a prosecutor may feel that she is in a position to exclude jurors she might otherwise have accepted. We can thus imagine a situation in which the composition of the jury panel *as a whole* could indeed have been affected by the erroneous ruling of the trial court. Therefore, we cannot say that such error can be characterized as harmless beyond a reasonable doubt.

I would also note that acceptance of the State's "harmless error" argument would be tantamount to insulating all jury selection error from any meaningful appellate review. Texas has asked us to adopt a rule which would in effect make all jury selection error "harmless" so long as the prosecutor can demonstrate that she was prepared to use an available peremptory challenge.

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2. A simple example will suffice to illustrate the point: Imagine that a prosecutor holds four remaining peremptory challenges. She can easily choose to use one of them to excuse a given prospective juror; however, if the prosecutor has already been forced to exhaust three of those "peremptories," she might think it prudent to acquiesce in the impaneling of a particular venireman, holding her remaining peremptory in reserve against the possibility of being confronted with an even more objectionable candidate.

However, if we were to accept this argument, we would be saying that a prosecutor could effectively insulate all jury selection error from any *habeas* or appellate review merely by asserting that she was ready to use an available peremptory challenge. One can readily predict what might happen if we were to adopt this position: prosecutors could routinely follow their challenges for cause with a note for the record asserting that the State would stand ready to use a peremptory in the event its "for cause" challenge was unsuccessful. The use of this strategem would result in our being unable to review any jury selection error, for all such error would be harmless. *Habeas* and appellate courts would be left with no means to enforce the jury selection guidelines set down by the Supreme Court and *Witherspoon* would surely wither.

Having offered these thoughts in support of Judge Gee's analysis of the *Witherspoon* problem, I would also add one final note. "I join the Court's opinion without ... departing from my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments." *Eddings v. Oklahoma,* _____*U.S.*_____, *102 S.Ct. 869, 877, 70 L.Ed.2d*_____*(1982)(Brennan, J., concurring).*

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Mark Milton Moore,	§	
Petitioner	§	
	§	
V.	§	**Civil Action No.**
	§	**C A - 3 - 77- 1 1 0 5 - D**
W.J. Estelle, Director,	§	
TDC, *Respondent*	§	

JUDGMENT

This action came on for consideration by the Court and the issues having been duly considered and a decision duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED that the Petitioner's application be granted to the extent that the imposition of the sentence of death is hereby vacated.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Petitioner's application is granted and the Petitioner is ordered discharged upon the expiration of one hundred and twenty (120) days from the date of this judgment, unless within such period the Petitioner's death sentence is commuted to a life sentence as may be provided by applicable State law or the Petitioner is granted a new trial.

IT IS FURTHER ORDERED that in the event this judgment is appealed from the effect of this judgment shall be stayed pending the determination of such appeal.

IT IS FURTHER ORDERED that the Clerk shall transmit a true copy of this judgment together with a true copy of the order adopting the findings, conclusions and recommendation of the United States Magistrate to the Petitioner, Respondent, all counsel and to the presiding judge of the State Criminal District Court in which the Petitioner was prosecuted.

SIGNED AND ENTERED this 27th day of April, 1981.

/s/ Robert M. Hill

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Mark Milton Moore,	§	
Petitioner	§	
	§	
V.	§	**Civil Action No.**
	§	**CA-3-77-1105-D**
	§	
W.J. Estelle, Director,	§	
TDC, *Respondent*	§	

ORDER

After making an independent review of the pleadings, files and record in this case, and the findings, conclusions and recommendation of the United States Magistrate together with the objections filed by the Respondent, I am of the opinion that the findings and conslucions of the Magistrate are correct and they should be adopted as the findings and conclusions of the Court with the following additional conclusions.

The Respondent, W.J. Estelle, Jr., argues at paragraph III in its objections to the findings, conclusions and recommendation of the Magistrate that the improper exclusion of veniremen Reeb and Kearby could be shown to have been harmless because the State had remaining peremptory challenges which it would have excercised in excluding these two veniremen from the jury.[1] Respondent's contention, however, is foreclosed

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1. Although Respondent objects to the Magistrate's finding that venireman Reeb was improperly disqualified, the Respondent makes no objection to the Magistrate's finding that venireman Kearby was improperly excused under Witherspoon v. Illinois, 391 U.S. 510 (1968).

by the holding of the Court of Appeals for the Fifth Circuit in *Burns v. Estelle*, 592 F.2d 1297 (1979), that

> [n]o jury from which even one person has been excused on broader *Witherspoon*-type grounds than these may impose a death penalty or sit in a case where it may be imposed, regardless of whether an available peremptory challenge might have reached him.

592 F.2d at 1300. Thus, whether the State had remaining three peremptory challenges and could demonstrate that it would have exercised two of them on Reeb and Kearby could not cure the harm to Petitioner that existed when he was tried before the jury which was selected in his case.

It is so ORDERED.

SIGNED AND ENTERED this 27th day of April, 1981.

/s/ Robert M. Hill

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Mark Milton Moore,	§	
Petitioner	§	
	§	
V.	§	**Civil Action No.**
	§	**CA-3-77-1105-D**
W.J. Estelle, Director,	§	
TDC, *Respondent*	§	

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE

Pursuant to the provisions of 28 U.S.C. 636(b), and an Order of the Court in implementation thereof, the subject cause has previously been referred to the United States Magistrate. The findings, conclusions and recommendation of the Magistrate, as evidenced by his signature thereto, are as follows:

FINDINGS AND CONCLUSIONS:

Type Case: This is a petition for Writ of Habeas Corpus relief filed by a State inmate pursuant to 28 U.S.C. §2254.

Parties: Petitioner is an inmate at the Ellis Unit of the Texas Department of Corrections at Huntsville, Texas, awaiting execution of a sentence of death imposed by the Criminal District Court of Dallas County, Texas, in Cause No. C-74-3180-PH.

The Respondent is the Director of the Texas Department of Corrections.

Statement of the Case: Upon a plea of not guilty Petitioner was tried by a jury for the offense of capital murder as charged in the indictment filed in Cause No. C-74-3180-PH. The jury found the defendant guilty as charged. The issue of punishment was submitted to the jury pursuant to Article 37.071, Texas Code of Criminal Procedure, and the jury answered each question pursuant to subdivision (b)(1)-(3) in the affirmative. Upon the unanimous affirmative answers of the jury, the District Court sentenced the Petitioner to death (Id., subdivision (e)).

The Petitioner effected a direct appeal from his conviction, and the Texas Court of Criminal Appeals affirmed in *Moore v. State,* 542 S.W.2d 664 (Tx.Crim.App. 1976). The Petitioner filed an application for Writ of Certiorari in the United States Supreme Court, and certiorari was denied at 431 U.S. 949 (1977). Thereafter the Petitioner filed his present application in this Court.

In support of his claim for habeas corpus relief the Petitioner asserts the following grounds:

1. Petitioner's conviction and sentence are void because of discriminatory application of law against him based upon race in violation of his rights of "due process" and "equal protection".

2. Petitioner's conviction is void because of the use of an alleged illegally obtained confession.

3. The Texas Capital Punishment Statute violates the Eight Amendment prohibition against cruel and unusual punishment.

4. Petitioner's conviction is void because the jury was selected in a manner violating the *Witherspoon* standard.

5. Unconstitutional psychological evidence was introduced agianst Petitioner in the punishment phase of trial.

6. Fingerprints were taken from the Petitioner in violation of the Fourth and Fourteenth Amendments.

7. The Court of Criminal Appeals violated the Petitioner's right of equal protection in failing to apply established precedents to the Petitioner's case.

8. The Petitioner was deprived of a fair and impartial jury.

9. The second question submitted to the jury in the punishment phase of trial (Article 37.071 (b)(2), *supra*) violates the Petitioner's "due process" rights.

Findings and Conclusions: The filing of findings and the recommendation in the instant application have been deferred pending resolution of jury selection issues pursuant to *Witherspoon v. Illinois*, 391 U.S. 510 (1968), by the Supreme Court in *Adams v. Texas*, _____U.S. _____, 100 S.Ct. 2521 (1980); and by the Fifth Circuit in its *en banc* decision in *Burns v. Estelle*, 626 F.2d 396 (5th Cir. 1980), which are similar to those raised in ground 4 in Petitioner's application. Both cases have now been decided by the appellate courts, and in light of such holdings I am of the opinion that relief must be granted on Petitioner's fourth ground, and therefore it is unnecessary to consider the remaining issues raised in the Petitioner's application.

At the time of Petitioner's trial in April and May 1974 the grounds which existed for challenges for "cause" to a jury veniremen's participation as a petit juror consistent with the constitutional requirements of "due process", were contained in the Supreme Court's decision in *Witherspoon v. Illinois, supra*, to wit: veniremen could

be excluded for cause whenever such persons made it unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitudes toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt.*

In the intervening period between the *Witherspoon* decision and Petitioner's trial the State of Texas revised its capital punishment scheme in response to the Supreme Court's decision in *Branch v. Texas*, 408 U.S. 238 (1972), [see Texas Penal Code §19.03; Texas Code of Criminal Procedure, Article 37.071 (effective July 14, 1973)] to provided for a bifurcated trial requiring the jury to first determine whether the defendant is guilty of a capital offense, and if they so find, then the jury is required to answer three statutory penalty questions in the affirmative before the death penalty can be imposed.

Although the Supreme Court dealt with the unitary trial procedure in *Witherspoon v. Illinois, supra*, its holding is equally applicable to the bifurcated proceeding applied in the Petitioner's criminal trial. *Adams v. Texas, supra*, at pages 2525-2525.

In the present application Petitioner claims nine named prospective jurors were improperly excluded for "cause" by the trial judge. The improper exclusion of even one venireman on grounds at variance with the *Witherspoon* standard is fatal to the imposition of a death sentence. *Davis v. Georgia*, 429 U.S. 122 (1976).

Implicit in the Supreme Court's decision in *Adams v. Texas, supra*, and in the Fifth Circuit's opinion in *Burns v. Estelle* are two unique factors. As distinguished from the provisions of §2254(d), the fact that a trial court's decision is based upon credibility choices made in light of the fact that the judge was able to observe the man-

ner in which the prospective venireman responded to counsels' questions and the demeanor of veniremen at the time he or she made reply to the questions, is not dispositive. To the contrary, it appears that in reviewing the trial court's decision in the context of a *Witherspoon* issue, Federal habeas courts are limited to a review of the written transcription of the questions and answers. Second, the exclusionary grounds recognized by the Supreme Court in *Witherspoon* have a talismanic character, see *Burns v. Estelle, supra,* at page 398, and the State's failure to pose the questions in the precise language of the *Witherspoon* exclusion may well fatally infect the jury selection process; but see also the question posed in *Lockett v. Ohio,* 438 U.S. 586, 595-596 (1978) cited in *Adams v. Texas, supra,* at page 2526.

These factors cast a serious doubt on whether any but the most unequivocally outspoken opponents to capital punishment may ever properly be excluded from a panel of veniremen in a death penalty case. Notwithstanding the Supreme Court majority's recognition that "The State may insist ... that jurors will consider and consider the facts impartially and conscientiously apply the law as charged by the court" (See *Adams v. Texas, supra,* at page 2526), a trial court is faced with a formidable burden of upholding this standard while at the same time avoiding an infringement of the accused's constitutional rights.

Although the question of exclusion of a prospective juror is at bottom a question of law, his suitability to sit is predicted upon his answers to factual inquiries presented by counsel for the adversaries. Absent some showing that a venireman knows the parties, counsel, a prospective witness at trial or has personal knowledge of the case, ordinarily it may be concluded that such an individual is devoid of any bias toward the case, as distinguished from a fact witness who frequently, even if not a party, harbors some favoritism which may adversely reflect on his credibility.

The fact that a juror has no inherent bias generally does not obviate all questions concering his credibility or suitability as a juror. Equivocation in answers, refusal or hesitancy in answering, and a venireman's overall demeanor are factors which may bear on his qualifications. Although not an inclusive list of factors, of the three noted, only evidence of the first can be gleaned from a "cold" record consisting of the transcript. Because a transcript is incapable of reflecting such subtle nuances bearing on credibility, appellate courts have historically deferred to the judgment of the fact finder, except when evidentiary support for the conclusions reached is lacking. However, the factors considered and the dispostions made by the Supreme Court and the Fifth Circuit in *Adams v. Texas, supra*, and *Burns v. Estelle, supra*, respectively, strongly suggests that application of this judicial convention is inappropriate in death penalty cases.

The second circumstance is likewise problematic. Absent submission of the exclusionary questions in *haec verba*, the trial court is placed in the difficult posture of extrapolating the answers to these questions from the actual responses of each panel member. Even when the questions are squarely presented, it does not necessarily follow that the question is susceptible to an unequivocal answer from the prospective juror's standpoint. This is amply demonstrated by many of the responses elicited from the named individuals excluded for cause in the Petitioner's case. The reliability of verbal responses also tends to be undermined by the fact that, at least in Texas, a prospective juror is called upon to respond to the questions in the abstract without the benefit of any assertions of what the evidence will tend to establish at either the guilt-innocence stage of the trial or during the punishment phase.

Another factor, though not articulated by the appellate courts, which undoubtably played a role in the

questioning of prospective jurors in the Petitioner's case was the adversarial postures of counsel for the parties. Based upon this court's former experience both as a prosecutor and as defense counsel in criminal trials, it is apparent that the attorneys for both the State and for the Petitioner were attempting to elicit answers sufficient to either exclude jurors for cause under the *Witherspoon* standard or to remove grounds for excluding jurors for cause. Counsel for neither side can be faulted for its efforts. Both sides had a right to a fair and impartial jury and their questions attempt to probe the opinions of the prospective jurors. Additionally counsel for the Petitioner unquestionably was obligated to attempt to limit to the extent possible prospective jurors subject to challenge for cause. Indeed had the trial court truncated Petitioner's counsel's examination of the jury venireman, such action may well be sufficient to constitute error. See *Burns v. Estelle, supra*, 397-398, footnote 2. Unfortunately as a side effect to counsel's inquiries it appears that not a few of the venire were reduced to a state of total confusion.

In spite of the practical difficulties presented by the selection process mandated by the appellate courts in death penalty cases, it is clear that both the Supreme Court and the Fifth Circuit have enunciated unequivocal statements of law which pertain to the selection process.

As noted by the Supreme Court in *Adams v. Texas, supra*, "...*Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than ability to follow the law or abide by their oaths, the death sentence cannot be carried out" (at page 2527). Further persons who stated that they would be "affected" by the possibility of the death penalty, but "who *apparently* meant only that the potentially lethal consequences of

their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally" (at page 2528) and those who "were unable positively to state whether or not their deliberations would in any way be affected"' (at page 2528) cannot be excluded for cause consistent with the due process requirements of the Sixth and Fourteenth Amendments. It is likewise clear in *Burns v. Estelle* that nothing but unmistakably clear answers of venireman establishing that he could or would not set aside his personal views and therefore would not follow the court's instruction is sufficient to permit his exclusion for cause.

The discharge of this court's duty in determining whether the exclusion of the nine named veniremen conforms with constitutional standards is not without peril. The sole benchmarks available to it are the language of the appellate court's opinions and portions of *voir dire* passages footnoted in the opinions. See *Adams v. Texas, supra,* footnote 7 at page 2528; *Burns v. Estelle, supra,* footnote 2 at page 397-398. Of additional benefit are *voir dire* passages appended to the panel opinion in *Burns v. Estelle,* 592 F.2d 1297, 1302-1305 (5th Cir. 1979). In Petitioner's cause the *voir dire* examination which this court must scrutinize varies in length from one to forty pages.

In considering the *voir dire* examination of the nine veniremen identified in Petitioner's fourth ground it is appropriate to review them in chronological order as they appear in the record.[1]

At the outset it is to be observed that in affirming Petitioner's conviction, the Court of Criminal Appeals

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1. The pagination referred to in this recommendation is that which appears in the lower right hand corner of the transcript.

held that the provisions of §12.31(b), V.T.C.A., Penal Code, provided a separate and distinctive basis for exclusion for cause from those enunciated in *Witherspoon v. Illinois. Moore v. State*, 543 S.W.2d 664 (Tx.Crim.App. 1976) at page 672. The Supreme Court in *Adams v. Texas* expressly held that "...the use of §12.31(b) to exclude jurors on broader grounds [than those provided in *Witherspoon*] based on their opinions concerning the death penalty is impermissible" (at page 2528, see also footnote 5, page 2527).

The venireman, Mrs. Delphia Sanders (R. 578-579) was excused. While she was not queried in the exact language of *Witherspoon*, her unequivocal responses in opposition to the death penalty under any facts or circumstances satifies the first prong of the *Witherspoon* standard, and thus it was not constitutional error to exclude her. Louis C. Ritter (R. 579-580) by his answers falls within the same category, and was also properly excluded.

The circumstances presented in the case of the venireman Vickie Costley (R. 1013-1052) aptly illustarate the difficulties presented to the trial court as well as to a reviewing court in the context of a habeas corpus petition. The colloquys between Miss Costley, the prosecutor, the defense counsel and the trial court as recorded in the transcript reflect that she answered the questions in such a manner as to establish both that she was qualified as well as being unqualified under *Witherspoon*. This court is unaware of any cases which have considered the qualifications of jurors whose unequivocal answers given at different stages of the *voir dire* are wholly contradictory.

Miss Costley initially answered that she could answer the questions presented truthfully (R. 1018, line 11-24), and that she would take an oath to follow the court's instructions (R. 1023, line 21-1024, line 13). However, she

then stated that she would not follow the Texas law of "principals" (R. 1032-1034), and further she could not follow the law of the second statutory questions under Art. 37.071 (Texas Code of Criminal Procedure (R. 1041, line 15-1042, line 17) but again indicated that she might be able to answer the question (R. 1043, line 1-24). At the end of the *voir dire*, the venireman said she did not think she *could* follow the law (R. 1045, line 18-25). At the conclusion of defense counsel's questioning, Miss Costly stated she could not participate as a juror in a death penalty case (R. 1049, line 2-1050-1052, line 2).

If certain of Miss Costley's answers are considered in isolation, it is apparent that she could not be excluded for cause. However, her final remarks are wholly analogous to the situation presented in *Lockett v. Ohio, supra*, at 595-596, in which the Supreme Court held that exclusion under such circumstances was not improper. If the Supreme Court's statement that "The State may insist ... that jurors will consider and *decide* the facts impartially and conscientiously apply the law as charged by the court (*Adams v. Texas*, at page 2526, emphasis added)" is to be construed at face value, exclusion of Miss Costley cannot constitute constitutional error.

The testimony of Martha L. Bradford (R. 1168-1185) is not unlike that of Miss Costley. She testified she could not make fact findings if the answers may result in the imposition of a death penalty (R. 1170, line 2-19). However, in the course of examination she also stated she could sit as a juror on a death penalty case, if the facts were bad enough (R. 1176, line 8-15; line 23-25). Thereafter she stated unequivocally that she could not participate as a juror in a case where a sentence of death might result (R. 1179, line 14 to 1181, line 1); (R. 1181, line 10 - R. 1182, line 3) (R. 1183, line 10 - 1184, line 21). Exclusion of Ms. Bradford as a juror was not violative of Petitioner's constitutional rights. *Lockett v. Ohio, supra.*

The next venireman excluded for cause was Sandra N. Wheeler (R. 1580-1609). Although the questions posed by the prosecutor were not very artfully phrased, it appears from her answers that she would not have been influenced in her deliberations by the fact that the death penalty might be imposed (R. 1583, line 6-10). Thereafter the questions of the prosecution were framed in terms of §12.31(b). V.T.C.A., Penal Code, to wit: Whether possible imposition of the death penalty would affect her deliberations. To these inquiries, Ms. Wheeler responded in the affirmative (R. 1594, line 21 to R. 1595, line 6) but she also indicated it would not affect her deliberations (R. 1597, line 2-9; line 18-25); but see also R. 1502, line 11-19. After her interrogation the trial court excluded her on the ground that she would be "concerned about the effect" the results in her deliberation (R. 1606, line 16-20).

At the time of his ruling the trial court was acting entirely consistent with Texas State law and indeed his action was upheld by the Texas Court of Criminal Appeals, *Moore v. State, supra,* at page 672, on the basis that §12.31(b) provided a ground for exclusion independent of *Witherspoon v. Illinois, supra.* The actions of both the trial court and the Texas appellate court were taken without benefit of the Supreme Court's subsequent decision in *Adams v. Texas, supra.*

In substance Ms. Wheeler's answers indicate no more than that the severity of the possible punishment of death would cause her to carefully consider her decisions. c.f. Answer of Forrest Jenson, footnote 7, *Adams v. Texas, supra,* at page 2528. Such an expressed attitude falls far short of the unequivocal objection to the death penalty under the *Witherspoon* standard and therefore it was error of constitutional magnitude to exclude Mrs. Wheeler as a member of the panel.

The *voir dire* examination of Katherine C. Kearby (R. 1609-1646) illustrates the practical problems which arise when lay persons are called upon to articulate deep-seated feelings and opinions in response to questions of attorneys predicted on abstract propositions of criminal law. The reliability of a venireman's conscientious response may well be undermined by the layman's inability to accurately perceive the legal theories involved. In a manner similar to that of Miss Costley, *supra*, Ms. Kearby gave contrary responses to the same question. E.g. Ms. Kearby stated she could not follow the law of principals (R. 1617, line 18 - R. 1619, line 16). However, she also stated that she could follow the law of principals (R. 1622 line 22 - R. 1624, line 14; R. 1629, line 5-13).

In reviewing the *voir dire* of Ms. Kearby it appears that she clearly did not wish to participate as a juror in a case where a sentence of death might result (R. 1613, line 24 to R. 1613, line 21; R. 1628, line 11-25) but it is also clear that if impaneled as a juror she would have followed the law and answered the questions in light of the evidence (R. 1642, line 15 - R. 1642, line 1; R. 1644, line 16 - R. 1645, line 22). Although reluctant to serve as a juror it does not appear that Ms. Kearby's answers were such as to disqualify her from jury service under either prong of the *Witherspoon* standard. Had the trial court permitted further probing of her opinions it is possible that her answers would establish a basis for disqualification. Instead the judge posed the question in terms of §12.31(b), supra, and being informed that the seeking of a death penalty would "affect" her deliberations, the court excused her (R. 1645, page 17 to R. 1646, line 8). *Adams v. Texas, supra*, compels a finding that exclusion on such grounds was improper.

Mrs. Freda H. Reeb (R. 2430-2446) was excluded by the trial court as a juror (R. 2446). The Court of Criminal Appeals did not reach the *Witherspoon* issue in

considering the propriety of the judge's act. See *Moore v. State, supra,* at page 472. In light of *Adams v. Texas, supra,* only the *Witherspoon* standards are sufficient to warrant exclusion. Although participation as a juror would bother her (R. 2433, line 13-21) and she was opposed to the death penalty (Id, line 4-12) she also stated that if impaneled she would follow the court's instructions (R. 2441, line 15 - R. 2442, line 8; R. 2442). Her answers are insufficient to satisfy either basis for exclusion under *Witherspoon.* C.f. Answers of Mrs. Doss, footnote 2, *Burns v. Estelle, supra,* at page 397-398, and thus it was improper to exclude her.

Mrs. Frank Clark (R. 2485-2495) testified that she was unalterably opposed to the death penalty in any case (R. 2485, line 21-24) and that she could not sit on a jury where the sentence might be death (R. 2486, line 9 - R. 2487, line 2, 11-20). Based upon her opinion she could not listen to the evidence in "right conscience" (R. 2489, line 5-12) and that no set of facts or circumstances would justify capital punishment (R. 2492, line 3-9). Such answers demonstrate that Mrs. Clark's attitude toward the death penalty would prevent her from an impartial consideration of the fact issues presented to the jury. Exclusion of Mrs. Clark was not constitutionally infirm.

Miss Louise M. Laird (R. 2496-2502) stated that she was not opposed to the death penalty (R. 2497, line 3-4) but that she would not take the juror's oath and participate in a case in which the death penalty was sought (R. 2498, line 19 - R. 2499, line 9; line 12 - R. 2500, line 16; R. 2601, line 16 - R. 2502, line 21). Her statements are similar in substance and effect to those described in *Lockett v. Ohio, supra,* at 595-596. It was not error to exclude Miss Laird from the jury panel.

CONCLUSION:

Because of the "due process" violations which occur-

red in the jury selection at Petitioner's trial in Cause No. C-74-3180-PH, the death sentence imposed cannot be executed. To reiterate, of the nine jury veniremen who were excluded for cause of which the Petitioner complains in his present application, I am of the opinion that no constitutional error is demonstrated as to veniremen Delphia Sanders, Louis Ritter, Vickie Costley, Martha L. Bradford, Frances Clark and Louise M. Laird. However, I am further of the opinion that Sandra N. Wheeler, Katherine C. Kearby, and Freda H. Reeb were not subject to exclusion under the standards of *Witherspoon*, and that it was therefore error of constitutional dimension to have removed them for cause from the jury panel.

Consideration of the facts adduced at Petitioner's trial is not relevant to this court's decision. Nonetheless I feel obligated to observe that the evidence presented demonstrates that the Petitioner committed a vicious and senseless crime. It appears beyond any doubt that if imposition of the death penalty can be imposed under the Constitution, the Petitioner's conduct in killing the deceased warranted such a severe penalty. In concluding that the death penatly cannot be constitutionally imposed against the Petitioner, this court feels the same personal frustration and dissatisfaction as that voiced by Judge Gee in the panel opinion issued in *Burns v. Estelle*, 592 F.2d 1297, at page 1302 (1979). Likewise, however, this court aided by the subsequent authority of *Adams v. Texas* and *Burns v. Estelle (en banc) supra*, must also conclude that decisions of the Supreme Court and the Fifth Circuit compel the result reached herein.

RECOMMENDATION:

For the foregoing reasons it is recommended that the Petitioner's application be granted conditionally to the extent that the Petitioner's punishment has been set as

the imposition of death, unless within 120 days the Petitioner's death sentence is set aside as provided under Texas State law, or the Petitioner is retried for the offense charged in Cause No. C-74-3180-PH.

/s/ William F. Sanderson, Jr.
United States Magistrate

Opposition

ORIGINAL

NO. 81-2048

MAY 27 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,

Petitioner

V.

MARK MILTON MOORE,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES P. FINSTROM
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2620 Cedar Springs
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214-747-9603
Texas Bar #07038000

NO. 81-2048

IN THE

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OCTOBER TERM, 1981

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TEXAS DEPARTMENT OF CORRECTIONS,

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V.

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Respondent

BRIEF IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Mark Milton Moore, Respondent herein, by and through his attorney, James P. Finstrom, and requests that the Court deny the Petition For Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit, and as grounds therefor, would respectfully show the Court the following:

QUESTIONS PRESENTED FOR REVIEW

I. Does Davis v. Georgia foreclose the possibility that Witherspoon v. Illinois error can be harmless beyond a reasonable doubt?

II. Is the exclusion of a venireman in violation of the doctrine of Witherspoon v. Illinois harmless beyond a reasonable doubt where the state demonstrates that it would have per-

emptorily excused the venireman had he not been excused for cause?

PARTIES TO THE PROCEEDING

The caption to this case contains the names of all the parties to this cause.

TABLE OF AUTHORITIES

	Page
Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), adhered to en banc 626 F.2d 396 (5th Cir. 1980)	3
Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976)	4
Grijalva v. State, 614 SW2d 420 (Tex. Crim. App. 1980) (en banc)	3
Witherspoon v. Illinois, 391 US 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)	

OPINIONS BELOW

The United States District Court for the Northern District of Texas, Dallas Division, on February 24, 1981, entered a judgment and memorandum order adopting the recommendation of the United States Magistrate and granting respondent's application for writ of habeas corpus under 28 U.S.C. Sec. 2254 and vacating his death sentence. On March 12, 1982, a panel of the United States Court of Appeals for the Fifth Circuit affirmed the district court's judgment in an opinion published as Moore v. Estelle, 670 F.2d 56 (5th Cir. 1982).

JURISDICTION

The Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. Sec. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. VI, in part provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...

United States Constitution, Art. XIV, in part provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of

the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent adopts the statement of the case presented in Petitioner's Application in this cause.

SUMMARY OF ARGUMENT

Any violation of the Witherspoon doctrine violates the rights of an accused charged with a capital offense to a fair and impartial trial as guaranteed by the Constitution to the United States. Such error cannot be made harmless or corrected post-trial by affidavits demonstrating an intent by the state how it would have utilized its peremptory challenges had the error not been committed.

ARGUMENT

The state in this cause urges that Witherspoon error should be rendered harmless where the state demonstrates that it would have peremptorily excused the venireman in question had he not been excused for cause. This argument clearly contravenes the holding of this Court, in a case where the state arguably retained a peremptory challenge, that the exclusion of even one venireman on grounds broader than those of Witherspoon precludes the imposition of the death penalty. Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed 2d 339 (1976) The possibility of capital punishment in a criminal trial demands this high standard for jury selection. It is not argued that the state cannot comply with the mandates of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed 2d 776 (1968). Nor should such argument be entertained.

Further, this Court should not consider seriously any attempt of the state to exercise peremptory challenges reserved at the time of jury selection retroactively. Fundamental fairness prohibits any consideration of such an attempt.

The Texas Court of Criminal Appeals has rejected such an attempt in Grijalva v. State, 614 SW2d 420, 424-5 (1980). The doctrine announced in Witherspoon should not be eroded, certainly not in the manner argued by the petitioner in this cause.

CONCLUSION

For the reasons stated, Respondent respectfully prays that the petition for writ of certiorari be denied and that the judgment of the Court of Appeals be upheld.

Respectfully submitted,

James P. Finstrom
Counsel for Respondent
2620 Cedar Springs
Dallas, Texas 75202
214-747-9603
Texas Bar #07038000

CERTIFICATE OF SERVICE

I certify that I served petitioner in this cause with a copy of this brief and the application to proceed in forma pauperis with supporting affidavit by placing same in the United States Mail, postage prepaid, on the 25 day of May, 1982, through its attorney, Leslie A. Benitez, Assistant Attorney General, P.O. Box 12548, Capital Station, Austin, Texas 78711, and upon the Solicitor General of the United States.

James P. Finstrom

ORIGINAL

NO. 81-2048

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IN THE

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OCTOBER TERM, 1981

W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,

Petitioner

V.

MARK MILTON MOORE,

Respondent

APPLICATION TO PROCEED IN FORMA PAUPERIS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Mark Milton Moore, Respondent, by and through his attorney, James P. Finstrom, and applies to the Court to proceed in forma pauperis, and would show the Court that he is indigent, that he has been incarcerated in the Texas Department of Correction since 1974, that he had no property or assets at that time and has not acquired any since, and that he should be permitted to proceed in forma pauperis in this cause. Further, counsel would show that he has not been appointed to represent Respondent since the conclusion of his appeal to the Texas Court of Criminal Appeals, but that he has proceeded without fee in the lower court proceedings in this cause. No other such application has been made below.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that this application be granted and that he be permitted to proceed in

forma pauperis in this cause, according to the Rules of this Court, and for such other relief to which he may be entitled.

James P. Finstrom
Counsel for Respondent
2620 Cedar Springs
Dallas, Texas 75202
214-747-9603
Texas Bar #07038000

NO. 81-2048

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

MARK MILTON MOORE,
Respondent

AFFIDAVIT IN SUPPORT OF APPLICATION
TO PROCEED IN FORMA PAUPERIS

I, Mark Milton Moore, being first duly sworn, depose and say that I am the Respondent in the above-entitled cause; that in support of my Application to Proceed in Forma Pauperis I am unable to pay the costs of said proceeding or to give security therefor or to pay printing costs or attorney's fees; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs in this cause are true.

1. Are you presently employed? No, I last was employed as a janitor in 1974 for approximately $500.00 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No.

3. Do you own any cash or checking or savings account? No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing? No.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Mark Milton Moore

Mark Milton Moore

STATE OF TEXAS

COUNTY OF WALKER

SUBSCRIBED AND SWORN TO before me this 25 day of May, 1982.

J. E. Estes

Notary Public in and for
Walker County, Texas

S.E. ESTES
NOTARY PUBLIC, WALKER COUNTY
MY COMMISSION EXPIRES 2-27-85

My commission expires: